

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

February 28, 1989

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Teamsters Local 957 (Northwood Stone & Asphalt Co.) Case 9-CE-53

584-1250-5000, 584-5056

This Section 8(e) case was submitted for advice on whether the hauling away of recyclable asphalt from a construction site constitutes "onsite" work within the construction industry proviso.

FACTS

The Employer is both a manufacturer of asphalt as well as a general contractor in highway construction. The Employer uses independent contractor owner-operators of dump trucks to haul new asphalt from its manufacturing plants to highway construction sites, and to haul old recyclable asphalt product (RAP) back to its plants.

RAP is removed from the surface of an existing highway by operation of a scraper machine. The scraper deposits the old asphalt via a conveyor belt into a dump truck which slowly moves along side. The scraper is run by an operating engineer and is not connected to the dump truck. After a dump truck is filled, which can take up to ten minutes, the truck is immediately replaced by another waiting dump truck. The Employer estimates that truck drivers spend three-quarters of their time driving between the highway construction site and the plant, and about one-quarter of their time driving along side the road. Of this latter time, truck drivers spend around two-thirds of their time waiting in line and the remaining one-third of the time loading with RAP.

The Employer is a "me-too" signatory to an area association bargaining agreement covering its construction work. That agreement contains a union-signatory subcontracting clause for all onsite work. The agreement specifically defines onsite work to include the "hauling of waste material off the jobsite."

In June 1988, the Union filed a grievance against the Employer alleging that the hauling of RAP constituted hauling waste and was thus onsite work. The grievance sought to require the current independent contractor RAP haulers to be covered by the contract. The Employer disagreed with this contract interpretation. In November 1988, the Union filed a Section 301 suit against the Employer seeking to enforce its contract interpretation.

ACTION

Section 8(e) complaint should issue, absent settlement, alleging that the Union reaffirmed a facially unlawful 8(e) clause.

The instant clause, on its face, provides that the "hauling of waste material off the jobsite" is subject to the union-signatory subcontracting clause. Hence, the clause, on its face, is secondary, i.e., it requires the Employer to do business only with independent contractor-haulers who are Unionized. Further, as a matter of law, the "hauling of waste material off the jobsite" is not within the ambit of the "construction site" proviso.¹ Accordingly, the Union's invocation of the face-invalid clause is unlawful.²

[FOIA EXEMPTIONS 2 & 5]³

H.J.D.

1 Joint Council of Teamsters No. 42 (Associated General Contractors of California), 248 NLRB 808 (1980); Teamsters, Local 294 (Island Dock Lumber, Inc.), 145 NLRB 484 (1963). Cf, Teamsters, Local 83 (Cahill Trucking Co.), 277 NLRB 1286 (1985).

The issue of whether work is within the proviso is a matter of law, i.e., statutory interpretation. In essence, as the above cases indicate, the proviso has been construed to exclude offsite hauling. The parties cannot change this result by agreeing in their contract to call such work onsite work.

2 See, e.g., Dan McKinney Co., 137 NLRB 649 (1962).

3 It should be noted that we are only concluding that the clause is unlawful on its face. We are not called upon to decide whether the Union has a fair claim to the work in question. If, for example, the work had been traditionally performed by unit employees and if the Union were seeking to retrieve the work for these employees, the dispute would be a primary one. And, the Union could rely upon past practices and other clauses in support of this claim. In the instant case, we are saying only that the Union cannot rely upon the union-signatory subcontracting clause.